Supreme Court, U. S.
FILED
OCT 24 1980
MICHAEL RODAK, JR., CLERK

No. 79-1068

In the Supreme Court of the United States

OCTOBER TERM, 1980

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ASSOCIATED DRY GOODS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

LEROY D. CLARK
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

TABLE OF CONTENTS

	Page
I. The Commission's disclosure regulations and rules are authorized by statute	1
II. The Commission's construction of the statute is consistent with Congress's intent and essential to the proper enforcement of the statute	4
III. That the Commission's policies may be unlike those of other agencies is immaterial	11
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144	4
Albemarle Paper Co. v. *Moody*, 422 U.S. 405	3
Batterton v. *Francis*, 432 U.S. 416	3
Burlington Northern, Inc. v. *EEOC*, 582 F.2d 1097, cert. denied, 440 U.S. 930	8
Charlotte Mecklenburg Hospital Authority v. *Perry*, 571 F.2d 195	9
Chromcraft Corp. v. *EEOC*, 465 F.2d 745	6
Chrysler Corp. v. *Brown*, 441 U.S. 281	3, 4
EEOC v. *General Electric Co.*, 532 F.2d 359	5
FCC v. *Schreiber*, 381 U.S. 279	2, 11-12
General Telephone Co. v. *EEOC*, No. 79-488 (May 12, 1980)	9, 12
Griggs v. *Duke Power Co.*, 401 U.S. 424	3
H. Kessler & Co. v. *EEOC*, 53 F.R.D. 330, aff'd and rev'd in part, 472 F.2d 1147, cert. denied, 412 U.S. 939	5, 10-11
Hall v. *EEOC*, 456 F. Supp. 695	5
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792	10
Mohasco Corp. v. *Silver*, No. 79-616 (June 23, 1980)	5

Cases—Continued: Page

Morton v. *Ruiz*, 415 U.S. 199 4
Nashville Gas Co. v. *Satty*, 434 U.S. 136 3
NLRB v. *Friedman*, 352 F.2d 545 2
NLRB v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 9
NLRB v. *Wyman-Gordon Co.*, 394 U.S. 759.. 3
Norwegian Nitrogen Co. v. *United States*, 288 U.S. 294 2
Pesikoff v. *Secretary of Labor*, 501 F.2d 757, cert. denied, 419 U.S. 1038..... 5
Ranger v. *FCC*, 294 F.2d 240 2
Sears, Roebuck & Co. v. *EEOC*, 435 F. Supp. 751, rev'd on other grounds, 581 F.2d 941 .. 5, 8
Shell Oil Co. v. *FPC*, 491 F.2d 82 5
Sibbach v. *Wilson & Co.*, 312 U.S. 1..... 2
Skidmore v. *Swift & Co.*, 323 U.S. 134..... 3
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 2

Statutes, rule and regulations:

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.*:
Section 706(b), 42 U.S.C. 2000e-5(b) 3, 5, 8
Section 709(e), 42 U.S.C. 2000e-8(e) .. 3-4, 6, 8
Section 713(a), 42 U.S.C. 2000e-12(a).... 1
Trade Secrets Act, 18 U.S.C. 1905..... 4, 11
5 U.S.C. 553(b)(A)..... 4
Fed. R. Civ. P. 35 1
29 C.F.R. 1601.22 ..... 5, 6
29 C.F.R. 1601.26(b)..... 6

Miscellaneous:

110 Cong. Rec. 12723 (1963) 5
118 Cong. Rec. 3372 (1972) 9
118 Cong. Rec. 4941 (1972) 7

Miscellaneous—Continued: Page

EEOC Compliance Manual:
§ 14.7 7
§ 83 6
§ 83.3(a) 6
§ 83.5(e) 6
§ 83.6(f) 6
42 Fed. Reg. 42022 (1977) 5
42 Fed. Reg. 42024 (1977) 5
42 Fed. Reg. 47828 (1977) 5
42 Fed. Reg. 47831 (1977) 5, 6
H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971)..... 9
S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971)..... 9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1068

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

ASSOCIATED DRY GOODS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent contends that the Commission's disclosure regulations and rules were promulgated without statutory authority; that they are inconsistent with the statutory language, scheme and legislative history; and that they are invalid because they are unlike those adopted by other administrative agencies. For the reasons set forth below and in our opening brief, these contentions are without merit. Accordingly, the judgment of the court of appeals should be reversed.

I. THE COMMISSION'S DISCLOSURE REGULATIONS AND RULES ARE AUTHORIZED BY STATUTE

Section 713(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-12(a), provides in relevant part that, "The Commission shall have authority from time to

time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title." Respondent's attack on the Commission's regulations (Br. 13–19) is necessarily premised therefore on the assertion that the regulations are "substantive," rather than "procedural."[1] That assertion is itself without substance because the regulations at issue govern the disclosure of information to persons directly involved in agency proceedings, and it is well-established that such regulations are procedural in character. See, *e.g.*, *FCC* v. *Schreiber*, 381 U.S. 279, 289–294 (1965); *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 307–308 (1933). See also *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543–545 (1978).

Respondent nonetheless contends (Br. 15) that the regulations are substantive because they affect substantive rights of confidentiality. In *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941), this Court rejected a similar attack on Fed. R. Civ. P. 35. The validity of a procedural rule turns not on whether the rule affects substantive rights, but on "whether [the] rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach* v. *Wilson & Co.*, *supra*, 312 U.S. at 14. Moreover, as the District of Columbia Circuit has noted, "all procedural requirements may and do occasionally affect substantive rights, but this possibility does not make a procedural regulation a substantive one." *Ranger* v. *FCC*, 294 F.2d 240, 244 (D.C. Cir. 1961) (Prettyman, J.).[2]

---

[1] Respondent raised this issue only in a footnote in its brief in the court of appeals (Brief for Appellee at 7 n.8 (No. 78–1696)). Neither court below addressed the issue.

[2] In *NLRB* v. *Friedman*, 352 F.2d 545 (3d Cir. 1965), the court upheld the decision of the Board's General Counsel to employ union ex-

Even if the Commission's disclosure regulations were properly considered to be "substantive," however, they are nonetheless valid as interpretative regulations. This Court has repeatedly recognized that while the Commission lacks authority to issue regulations that have the force and effect of law, its substantive guidelines are valid regulations interpreting its organic law and, as such, are entitled to deference. See, *e.g.*, *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 142–143 n.4 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433–434 (1971). See also *Batterton* v. *Francis*, 432 U.S. 416, 425–426 n.9 (1977); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Moreover, the regulations and rules at issue here constitute the Commission's longstanding and consistent interpretation of the disclosure provisions of Title VII. Sections 706(b) and 709(e) of Title VII, 42 U.S.C. 2000e–5(b) and

---

perts in analyzing information subpoenaed from an employer. The court noted that, "No trial or administrative proceeding could pursue truth effectively if an absolute right to keep private matters confidential was conceded to all parties involved" (*id.* at 548). That observation demonstrates that respondent's reliance (Br. 14) on *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), is misplaced. While the information that Chrysler sought to protect from disclosure may be similar in character to that which is at issue here, the regulations involved in *Chrysler* are dissimilar both in nature and in purpose. The *Chrysler* regulations provided for disclosure of information to the general public under the Freedom of Information Act, 5 U.S.C. 552, whereas the regulations at issue here involve disclosure of information to persons directly involved in, and in furtherance of, administrative proceedings. Likewise, respondent's reliance (Br. 16) on *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969), is misplaced. In *Wyman-Gordon*, the Court held only that the Board had failed to follow the Administrative Procedure Act when it ruled that employers must compile employee lists for union use in representation elections; the Board conceded that that requirement was "substantive" (*id.* at 765). The Commission's regulations here do not require employers to compile information solely to assist charging parties; the Commission seeks, for its own use, information which may also be disclosed to both parties to promote prompt resolution of the controversy pursuant to statutory mandate.

2000e-8(e).[3] They are entitled to deference unless contrary to the language or purpose of the statute.[4]

As we have fully discussed in our opening brief (Pet. Br. 28–43), the disclosure of information to parties and witnesses is an essential part of the Commission's administration of Title VII. If the Commission lacked authority to promulgate rules and regulations governing disclosure, either the work of the Commission would be halted or disclosure decisions would have to be made on the less satisfactory basis of *ad hoc* determinations, which might lead to unnecessary unpredictability and inconsistency.

II. THE COMMISSION'S CONSTRUCTION OF THE STATUTE IS CONSISTENT WITH CONGRESS'S INTENT AND ESSENTIAL TO THE PROPER ENFORCEMENT OF THE STATUTE

1. The disclosure provisions were enacted as "*a ban on publicizing and not on such disclosure as is necessary to the carrying out of the Commission's duties under the*

---

[3] Respondent's reliance (Br. 14) on *Morton* v. *Ruiz*, 415 U.S. 199, 236–237 (1974), is misplaced. In that case, the Court declined to uphold, as an interpretative rule, a regulation that was inconsistent with congressional intent and did not represent the agency's consistent interpretation of the statute. Likewise, in *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), the Court held only that OFCCP's public disclosure provisions did not satisfy the "except as provided by law" exception to 18 U.S.C. 1905, because they were neither based on an express grant of statutory authority nor properly promulgated under the Administrative Procedure Act, and did not therefore have the force and effect of law accorded legislative regulations. The Court carefully noted, however, that its holding did not imply that the rules were invalid because of a lack of express statutory authority (441 U.S. at 309 n.40, 315).

[4] Respondent contends (Br. 18 n.26) that the Commission did not follow the procedural requirements of the Administrative Procedure Act. That argument was not made in the court of appeals and it is therefore not properly raised here. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Moreover, the Commission's disclosure rules are exempt from the notice and comment requirements of the Act because they are procedural and interpretative rules. 5 U.S.C. 553(b)(A); *Chrysler Corp.* v. *Brown*, *supra*, 441 U.S. at 314. It should

statute" (110 Cong. Rec. 12723 (1963) (remarks of Sen. Humphrey) (emphasis added)). As we have shown in our opening brief (Pet. Br. 18–25), the purpose of the public disclosure provisions[5] is manifest in the language and scheme of the statute, and the Commission's construction of the statute is supported by the legislative history. The various attempts by respondent, amici, and the court below to settle upon a viable alternative construction only lend further substance to the Commission's view. Respondent variously contends that disclosure to persons directly concerned is categorically barred (Br. 25), and that the Commission may sometimes "capsulize the evidence [and] recite the parties' contentions" (Br. 29, 44).[6] The court below held that "indirect" disclosure was permitted (Pet. App. 6a), and one of the amici joins in that view (Equal Employment Advisory Council Br. 9–10). The second amicus asserts that "limited" disclosure is permitted

---

be noted, however, that 29 C.F.R. 1601.22 was in fact published for notice and comment. See 42 Fed. Reg. 47828, 47831 (1977); 42 Fed. Reg. 42022, 42024 (1977). Finally, the prelitigation disclosure rules contained in the EEOC Compliance Manual are instructions to the staff, interpreting the Commission's regulations, and do not therefore require notice and comment. See, *e.g.*, *Pesikoff* v. *Secretary of Labor*, 501 F.2d 757, 763 n.12 (D.C. Cir.), cert. denied, 419 U.S. 1038 (1974); *Shell Oil Co.* v. *FPC*, 491 F.2d 82, 87 (5th Cir. 1974); *Hall* v. *EEOC*, 456 F. Supp. 695, 701–702 (N.D. Cal. 1978); *Sears, Roebuck & Co.* v. *EEOC*, 435 F. Supp. 751, 761 (D.D.C. 1977), aff'd in part and rev'd in part, 581 F.2d 941 (D.C. Cir. 1978).

[5] Respondent now inexplicably suggests (Br. 1–2 n.1, 24–25 & n.38) that Section 706(b) is irrelevant despite respondent's reliance on it in the complaint (App. 11), and the fact that both courts below relied on that Section in analyzing the issues presented (see Pet. App. 5a–7a, 24a–25a, 31a). Respondent's suggestion can only be explained by its reluctance to consider together the two disclosure provisions in light of the presumption of consistent meaning afforded to words used in various provisions of a statute. See *Mohasco Corp.* v. *Silver*, No. 79–616 (June 23, 1980), slip op. 18. See also *H. Kessler & Co.* v. *EEOC*, 472 F.2d 1147, 1151 (5th Cir. 1973) (en banc); *Sears, Roebuck & Co.* v. *EEOC*, 581 F.2d 941, 948 (D.C. Cir. 1978).

[6] Respondent (Br. 44) ignores the fact that reasonable cause determinations must provide sufficient information to inform employers of the claims that may be asserted in Commission suits. See, *e.g.*, *EEOC* v. *General Electric Co.*, 532 F.2d 359 (4th Cir. 1976).

when "*absolutely* needed for the E.E.O.C. to fulfill its statutory duties" (American Retail Federation Br. 3; emphasis added). Each of these formulations casts serious doubt on the enforceability of the criminal sanctions contained in the disclosure provisions. Either the persons immediately involved in the administrative process are members of the public or they are not; there is no middle ground that will save the criminal penalties which Congress intended to impose upon Commission personnel who improperly publicize unproven charges of discrimination.[7]

2. a. Respondent's contention (Br. 13) that the Commission need not share factual information with the parties during the administrative process is simply incompatible with the Commission's statutory obligation to effectuate settlements when possible.[8] The keystone of the Commis-

---

[7] Respondent also suggests (Br. 11, 16, 42) that the Commission's regulations and rules unfairly favor charging parties to the disadvantage of employers. That assertion is unfounded. The Commission's regulation governing disclosures during the administrative process has remained virtually unchanged since 1965 (see 42 Fed. Reg. 47831 (1977)) and has consistently provided for disclosure of information "prior to the institution of any proceedings * * * to charging parties, or their attorneys, respondents or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief." 29 C.F.R. 1601.22. Pursuant to that regulation, necessary disclosures are made to both parties, on an even-handed basis, during the administrative process. In accordance with its interpretation of Section 709(e), the Commission has had separate rules governing prelitigation disclosures; these rules, which are now contained in § 83 of the EEOC Compliance Manual, apply only to disclosures "in connection with pending or contemplated litigation" (EEOC Compliance Manual § 83.3(a); Pet. App. 34a–35a). Both charging parties and employers are permitted to review the files after materials relating to conciliation efforts have been removed. EEOC Compliance Manual § 83.6(f). See also 29 C.F.R. 1601.26(b). Employers are treated differently from charging parties only to the extent that charging parties are permitted to review the files before litigation is commenced, whereas employers must wait until a lawsuit is actually filed (EEOC Compliance Manual § 83.5(e); Pet. App. 37a). This difference in treatment is based upon the fact that an employer will have no need to review the file, at that stage, unless the charging party decides to litigate his claim.

[8] Respondent attempts to support its all-encompassing definition of "public" by noting (Br. 22) that, "[w]ith respect to Title VII, Congress

sion's administrative process is the fact finding conference, where the parties meet together with a Commission representative to review the evidence, "resolve * * * factual disputes," and possibly discuss settlement (EEOC Compliance Manual § 14.7). Unless the Commission can compel the parties' attendance and the submission of information, the conference will be a meaningless formality.[9] At all events, it should be obvious that settlements will occur during the administrative process only when the parties have reason to believe that material facts are not being hidden from them. Only then can the Commission hope to use its knowledge and expertise to effectuate settlements. There is no basis for respondent's claim that the Commission's policy is unnecessary to the fulfillment of its statutory duties.[10]

---

did specifically authorize some disclosure—it directed service of the charge on the employer. 42 U.S.C. § 2000e–5(b)." Respondent argues therefore (*ibid.*; footnote omitted) that Congress "could have—but did not—permit disclosure of investigative information to charging parties or any other person." The provision upon which respondent relies was, of course, amended in 1972, and it no longer *requires* service of the charge itself. The legislative history demonstrates, however, that Congress intended that the Commission should exercise its discretion in determining whether the actual charge should be served in individual cases. See 118 Cong. Rec. 4941 (1972). Cf. *Chromcraft Corp.* v. *EEOC*, 465 F.2d 745, 748 (5th Cir. 1972). Congress's granting of that discretion is consistent with the Commission's construction of "public"; it is not consistent with respondent's.

[9] *Amicus* EEAC asserts (EEAC Br. 9) that, "It strains credulity to believe that an investigation or a realistic view of the facts by the parties during conciliation requires more than indirect disclosure of the substance of documents." As we have previously noted (Pet. Br. 35 & n.21), successful conciliation necessarily entails an abandonment of important legal rights, in which reasonable persons will not be likely to acquiesce without hard evidence of the facts.

[10] Respondent contends (Br. 26–27, 43) that voluntary disclosure of factual information is sufficient for these purposes. That suggestion would effectively place the conciliation process in the hands of the employer. It is unlikely that charging parties would be willing to settle their claims based on their employers' selective recital of the facts. Moreover, respondent erroneously asserts (Br. 44 n.73) that the Commission has continued to function, without disclosing information, in

b. We have previously answered respondent's contention (Br. 32–38) that the Commission's prelitigation disclosure rules "foster private litigation." The restricted prelitigation access to files permitted by the disclosure rules tends to discourage the filing of meritless lawsuits, and does not adversely affect conciliation efforts (Pet. Br. 38–40).[11] In addition, we note that respondent's arguments improperly minimize the importance that Congress has attributed to private litigation in securing compliance with the provisions of Title VII. Congress certainly expressed the hope that compliance might ordinarily be achieved through the Commission's efforts, and without the need for litigation, but Congress has also emphasized

---

the Fourth, Seventh and District of Columbia Circuits. Respondent's assertion is based on an incorrect factual assumption. First, the order of the court below has been stayed, except as to respondent, pending this Court's decision. Second, the Commission has interpreted the decisions in *Sears*, *supra*, and in *Burlington Northern, Inc.* v. *EEOC*, 582 F.2d 1097 (7th Cir. 1978), cert. denied, 440 U.S. 930 (1979), as applicable to all prelitigation disclosure in cases involving Commissioner's and consolidated charges, and in cases involving charges against Sears, Burlington and the Brotherhood of Railway, Airline and Steamship Clerks. EEOC Notice N-915. However, it was not until the decision below that a court of appeals expressly held that Sections 706(b) and 709(e) prohibit the Commission from disclosing information during its processing of individual charges.

[11] That the Commission now processes most charges within two months does not show that prelitigation disclosure is unnecessary (Br. 35 n.56), but it does show that disclosure will not adversely affect conciliation. If the Commission fails to secure a settlement agreement acceptable to both parties, it generally will have completed the administrative process within two months by issuing a "no reasonable cause" determination, by entering a settlement agreement without the assent of the charging party, or by failing to achieve a settlement agreement and issuing a "right to sue" letter. In these circumstances, the charging party has an unequivocal right to bring suit in federal court; in most cases, however, the charging party can make a reasoned determination whether to exercise that right only by reviewing the Commission's investigative file. Finally, the assertion by amici (ARF Br. 15, EEAC Br. 22–23) that prelitigation disclosure somehow circumvents the discovery provisions of the Federal Rules of Civil Procedure ignores the fact that the Commission is free, once a lawsuit has been filed, to provide such disclosure in any event. See Section 709(e) of Title VII, 42 U.S.C. 2000e–8(e).

that "[t]he primary concern must be protection of the aggrieved person's option to seek a prompt remedy in the best manner available." H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 13 (1971). Accord, *General Telephone Co.* v. *EEOC*, No. 79-488 (May 12, 1980), slip op. 7. See also S. Rep. No. 92-415, 92d Cong., 1st Sess. 24 (1971); 118 Cong. Rec. 3372 (1972) (remarks of Sen. Williams). While Congress may have hoped to accomplish its goal of eliminating employment discrimination by means of voluntary accommodation, respondent erroneously attributes more importance to that means than to the ultimate end for which it was devised.[12]

The Commissions's prelitigation disclosure rules, which assist charging parties in making an informed prelitigation analysis of the viability of their claims, is consistent with the principle that "[a]ll available resources should be available to [the] individual." 118 Cong. Rec. 3372 (1972) (remarks of Sen. Williams). We have previously discussed the rationale for these rules (Pet. Br. 36-44), and we have noted that certain materials contained in companion files are sometimes released because, for reasons of administrative convenience, all relevant materials may not be contained in the charging party's file (Pet. Br. 31-32).[13] The

[12] Contrary to respondent's assertion (Br. 25 n.39), the Commission's Freedom of Information Act disclosure policy is not inconsistent with its interpretation of the disclosure provisions. The Commission has always maintained that the parties, while not members of the public under the disclosure provisions, should have their disclosure rights determined by the Commission under the provisions of Title VII, rather than under the provisions of the Information Act. In *Charlotte-Mecklenburg Hospital Authority*, v. *Perry*, 571 F.2d 195 (4th Cir. 1978), therefore, the Commission took the position that the parties, while having a special status under Title VII, should have no greater disclosure rights than the general public when they choose to sue under the Information Act. At all events, the Commission now withholds information contained in "open" investigative files under this Court's decision in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978).

[13] As we have previously noted (Pet. Br. 32 n.19), the question whether the Commission may share information gathered in connection with charges filed by a member of the Commission is not at issue here because no such charge has been filed.

Commission allows charging parties to review only relevant evidence gathered in connection with other charges filed against the same respondent in the same district office. The rationale for that practice rests on the fact that the existence or nonexistence of a pattern of discrimination is often indispensable in determining whether an individual's claim has merit. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804-805 (1973).[14]

Finally, we note that there is no substance to respondent's contention (Br. 30-32) that the Commission's disclosure rules encourage the dissemination of confidential information to persons who are not directly involved in the administrative proceeding. We have previously stated (Pet. Br. 37-38 n.24) that we know of no case since 1965 in which that possibility has materialized. It is disingenuous, therefore, to suggest that the Commission is unable to enforce its disclosure rules.[15] Similarly, there is no merit

---

[14] The report filed by the Senate Committee on Labor and Welfare, in connection with the 1972 amendments, makes the same point (S. Rep. No. 92-415, 92d Cong., 1st Sess. 5 (1971) (footnote omitted)):

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. It was thought that a scheme that stressed conciliation rather than compulsory processes would be most appropriate for the resolution of this essentially "human" problem, and that litigation would be necessary only on an occasional basis. Experience has shown this view to be false.
>
> Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements. * * *

In a real sense, of course, "title VII actions are by their very nature class complaints" (*id.* at 27).

[15] The Commission's policy concerning prelitigation disclosure has been consistently applied since 1965 (App. 32-33). See also *H. Kessler*

to respondent's assertion (Br. 36) that employers will resist providing such information if this Court should uphold the Commission's regulations. That assertion ignores two important facts. First, employers have generally cooperated with the Commission under these regulations and rules for the past fifteen years. Second, any lack of cooperation on the part of employers is far more likely to result from the possibility that the Commission will subsequently use the information in the Commission's own litigation against the employer.[16]

III. THAT THE COMMISSION'S POLICIES MAY BE UNLIKE THOSE OF OTHER AGENCIES IS IMMATERIAL

Respondent asserts that other agencies do not share investigative information with the parties. While that assertion may be correct in some circumstances, it is immaterial. The legislative history of Title VII does not show that Congress intended the Commission to follow the practices of any other agency in this respect. Agencies are generally afforded some latitude in devising procedural mechanisms for carrying out their particular duties (*FCC* v. *Schreiber*,

---

& Co. v. *EEOC*, 53 F.R.D. 330, 332 (N.D. Ga. 1971), aff'd in part and rev'd in part, 472 F.2d 1147 (5th Cir.) (en banc), cert. denied, 412 U.S. 939 (1973). While more detailed instructions to the staff were published in the EEOC Compliance Manual in 1975 (see Pet. Br. 6 n.2), the only substantial change then effected was the addition of a requirement that persons sign a formal non-disclosure agreement; formerly an informal agreement had generally been deemed satisfactory (App. 32). Contrary to respondent's contention (Br. 7 n.8), such an agreement was signed here (see App. 77, 103, 109).

[16] Amici suggest that the Commission's disclosure of information is barred by the Trade Secrets Act, 18 U.S.C. 1905 (see ARF Br. 22–23, EEAC Br. 23–30). That contention was not made in the court of appeals and it is not properly raised here. At all events, the Trade Secrets Act does not invalidate the Commission's regulations because, assuming that the Act has any application in these circumstances, it must be applied on a case-by-case basis. Persons who decline to produce evidence frequently believe that the materials sought are "confidential." Whether specific materials are thus protected from disclosure must be determined on the facts of each case.

supra, 381 U.S. at 289-291), and the Commission's disclosure policies necessarily reflect the special and unprecedented functions that Congress has assigned to it. The Commission is unlike certain other agencies in that it must not only investigate charges and make a reasonable cause determination, but it must attempt to obtain a voluntary settlement before it can seek judicial enforcement. The Commission's administrative process therefore involves a more continuous and intimate participation by the charging party than do other agency proceedings.[17] As we have shown (Pet. Br. 34-36), the Commission's authority to disclose information is essential to successful conciliation. At all events, respondent has pointed to no case in which an agency has been precluded from sharing information with the parties or witnesses in furtherance of its investigation, the obtaining of rebuttal evidence, or the negotiation of a settlement.

CONCLUSION

The judgment of the court of appeals should be reversed.

Repectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

LEROY D. CLARK
General Counsel
Equal Employment Opportunity Commission

OCTOBER 1980

---

[17] Charging parties also have a special place in this statutory scheme because they retain the right to sue, regardless of the Commission's determination: "The EEOC's civil suit was intended to supplement, not replace, the private action." *General Telephone Co.* v. *EEOC*, No. 79-488 (May 12, 1980), slip op. 7. It is noteworthy that the National Labor Relations Board, upon whose practices respondent relies for comparison, directs its regional office to "openly discuss" the facts with the parties when the possibility of settlement is real, despite its general policy against prehearing disclosures. See *NLRB* v. *Robbins Tire and Rubber Co.*, No. 77-911, NLRB Br. 19.